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No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HOWARD O. KIEFFER,

Petitioner

v.

BANK OF AMERICA, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the California Courts exceed their jurisdiction by classifying Petitioner as a "vexatious litigant" simply by virtue of his past bankruptcy filings?

II. Does California Code of Civil Procedure § 391, relating to "vexatious litigant" status, violate the Supremacy Clause of the United States Constitution to the extent that it permits the imposition of a penalty for the filing of a petition in Bankruptcy?

LIST OF PARTIES TO THE PROCEEDING[1]

In addition to Bank of America National Trust & Savings Association, a National Banking Association, which is named on the caption page, additional parties include the following respondents[2]:

1 BA Properties I, Inc., a California Corporation; and

2. Continental Auxiliary Company, a California Corporation.

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[1] Although not a party to the action, the California Attorney General has been served pursuant to Rule 29.4© because the constitutionality of California *Code of Civil Procedure* § 391 is drawn into question, and, therefore, 28 U.S.C. § 2403(b) may be applicable. The issue has not been certified by the court to the Attorney General pursuant to 28 U.S.C. § 2403(b).

[2] Each of these parties is a subsidiary of Bank of America and is represented by the same counsel.

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PETITION FOR WRIT OF CERTIORARI

Howard O. Kieffer ("Petitioner") requests that a writ of certiorari issue to review the underlying judgment and opinion of the Court of Appeals for the Fourth District of California, for which the California Supreme Court denied a Motion to Review.

OPINIONS BELOW

The following orders and opinions were issued in this case:

1. Order Determining Plaintiff Howard O. Kieffer to be a Vexatious Litigant and to Post Security (Case No. 567341) Superior Court of the State of California, County of Orange. Filed June 1, 1993 (App. 12a-14a).

2. Judgment of Dismissal After Failure to Post Security as a Vexatious Litigant (Case No. 567341) Superior Court of the State of California, County of Orange. Filed December 3, 1993 (App. 15a-16a).

3. Unpublished Opinion re Appeal from Judgment (Case No. GO15656; Super. Ct. No. 567341) Court of Appeal of the State of

California, Fourth Appellate District, Division Three. Filed December 16, 1994 (App. 1a-11a).

4. Denial of Petition for Rehearing (GO15656) Court of Appeal of the State of California, Fourth Appellate District, Division Three. Filed January 17, 1995 (App. 17a).

5. Denial of Petition for Review (SO44543, Fourth Appellate Division, Division Three, No. GO15656) Supreme Court of the State of California. Filed March 2, 1995 (App. 18a).

JURISDICTION

The Opinion of the California Court of Appeals was entered on December 16, 1994, and a timely Motion for Rehearing was denied on January 17, 1995. A timely petition to the California Supreme Court for Review was denied on March 2, 1995. The jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article I, Section 8, clause 4, provides

> The Congress shall have the Power ... To establish an Uniform Rules of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

United States Constitution, Article VI, clause 2, provides:

> This Constitution, ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11 U.S.C. § 9011(a), provides in pertinent part[3]:

> The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it

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[3] The full text of this statute is set forth at App. 43a-44a.

> is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case.

California *Code of Civil Procedure* § 391 provides in pertinent part[4]:

> As used in this title, the following terms have the following meanings:
>
> (a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court of record.
>
> (b) "Vexatious litigant" means a person who does any of the following: ...
>
> (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

---

[4] The full text of this statute is set forth at App. 41a-42a.

STATEMENT OF THE CASE

Brief Overview This case concerns the California courts' unconstitutional interpretation of California *Code of Civil Procedure* § 391, which permits vexatious litigant status to be imposed as a result of filing a bankruptcy petition. Such an interpretation violates the Supremacy Clause of the United States Constitution, and any judgment entered by a California court under such facts exceeds the State court's jurisdictional parameters. For these reasons, this Petition for Writ of Certiorari should be granted.

Petitioner Howard Kieffer's attempts to prevent Bank of America from wrongfully foreclosing on his home form the basis for his present status as a vexatious litigant. Specifically, the California court found that because Petitioner had filed four bankruptcy petitions (two of which were dismissed for procedural errors), he was a vexatious litigant and could not proceed in the California court system without posting security in the sum of $45,000.

Factual Background In 1984, Petitioner Howard Kieffer purchased a home subject to a trust deed in favor of Bank of America.

Petitioner made timely payments on the Bank of America loan from the time of purchase through the foreclosure sale on the home. In 1984, Petitioner filed a bankruptcy petition. This filing had nothing to do with the Bank of America loan, and Petitioner kept the Bank of America loan current throughout the pendency of the bankruptcy. In 1987, Bank of America sought to enforce the "due on sale" clause in its note to the home's former owner.

Petitioner filed a second bankruptcy in April, 1988, while acting in propria persona. The bankruptcy court dismissed the proceeding for procedural errors made by Petitioner. Petitioner again attempted to file bankruptcy in May 1988, and again his petition was dismissed for procedural reasons. Petitioner corrected his mistakes and filed another bankruptcy petition in June, 1988. The bankruptcy court then held that the petition was filed for the sole purpose of avoiding a foreclosure sale, and dismissed the petition.

After dismissal of the third petition, Petitioner's home was sold at a foreclosure sale. Petitioner then brought an action in Orange County Superior Court against Bank of America for breach of fiduciary duty and breach of contract. Specifically, the complaint alleged that

Bank of America breached its agreement to postpone the foreclosure sale and to permit an assignment of its interest in the property.

Petitioner was represented by counsel in the State court action from September 7, 1988 through December 1, 1992. During that time the parties filed pleadings, conducted discovery, and otherwise litigated the action. On December 1, 1992, Petitioner's counsel substituted out of the case, leaving Petitioner to represent himself. On or about March 5, 1993, Bank of America filed a Motion for Order Determining Plaintiff to be a Vexatious Litigant and to Post Security based on the past bankruptcy filings.

Proceedings Below On June 1, 1993, the trial court entered its order declaring Petitioner a vexatious litigant and ordering that Petitioner furnish security in the sum of $45,000. The order states that the trial judge considered Petitioner's prior bankruptcies in making the vexatious litigant determination. Petitioner sought from the Court of Appeal a writ of mandate directing the Superior Court to vacate its order determining him to be a vexatious litigant. An order denying the petition was entered on June 30, 1993. Subsequently, Petitioner failed

to post a bond.

On December 3, 1993, the trial court entered a Judgment of Dismissal After Failure to Post Security as a Vexatious Litigant. The notice of entry of judgment was served on December 16, 1993, and Petitioner timely filed his Notice of Appeal on February 15, 1994.

On December 16, 1994, the Court of Appeal, Fourth Appellate District, Division Three, affirmed the judgment of the trial court. The Court held that California Code of Civil Procedure § 391(b)(3) applied to multiple bankruptcy filings. Appellant then filed a Petition for Rehearing, raising the jurisdictional and constitutional issues set forth in this Petition for Writ of Certiorari.[5] A copy of the Petition for Rehearing setting forth the manner in which these issues was raised is included set forth at App. 19a-40a. The Court denied the Petition for Rehearing on January 17, 1995 without opinion. The Court of Appeal's decision became final on January 15, 1995 and Petitioner timely petitioned the California Supreme Court for review of the Court of

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[5] Prior to filing the Petition for Rehearing in propria persona, Petitioner contacted his current counsel who aided him in the research and drafting of that petition. Until counsel was consulted, however, Petitioner was unaware of the jurisdictional and constitutional issues raised by the trial court's ruling.

Appeal's decision, again raising the constitutional and jurisdictional issues. That Petition was denied without opinion.

REASONS FOR GRANTING THE WRIT

I. CALIFORNIA STATE COURTS POSSESS NO JURISDICTION TO IMPOSE PENALTIES FOR THE FILING OF BANKRUPTCY PETITIONS

The United States Supreme Court should hear this case because the California courts have rendered decisions which they possess no authority to make. In this case, state courts have interpreted a state statute in a manner which brings state law into direct conflict with Federal law. The Supreme Court should hear this case to remove this conflict.

Article I, Section 8, Clause 4 of the United States Constitution makes clear that Congress has the power to establish uniform "Laws on the subject of Bankruptcies throughout the United States." This exclusive grant of power to Congress includes the Congressional ability to confer exclusive jurisdiction to the federal courts in the area of

bankruptcy, including exclusive jurisdiction to determine what penalties may flow from abuse of the bankruptcy process.

By granting this exclusive jurisdiction to the Federal courts, Congress precluded the state courts from exercising jurisdiction in that area. "A Congressional grant of exclusive jurisdiction to the federal courts includes the implied power to protect that grant." *Gonzales v. Parks*, 830 F.2d 1033, 1036 (9th Cir. 1987)(concluding that the imposition of a state mandated penalty based on the filing of a bankruptcy petition exceeds the state court's jurisdiction).

The ability of Congress to impose such a jurisdictional limitation has been acknowledged by this Court. "The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy court's law." *Kalb v. Feuerstein*, 308 U.S. 433, 439, 60 S.Ct. 343, 346 (1940).

The Ninth Circuit followed the rationale of *Kalb* in concluding that "Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of

other penalties. It is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process." *Gonzales*, 830 F.2d at 1036

In the case at bar, the trial court overlooked Congress' implicit rejection of other penalties, and improperly imposed vexatious litigant status based on prior bankruptcy petitions. This action was inherently improper because "state courts [do not] have subject matter jurisdiction to hear a claim that the filing of a bankruptcy petition constitutes" a basis for a state imposed penalty. *Id.* at 1035 (considering whether filing of bankruptcy petition can constitute basis for abuse of process action).

In so ruling, the *Gonzales* court noted that "[f]ilings of bankruptcy petitions are a matter of exclusive federal jurisdiction. ... That Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is supported by the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous." *Id.* at 1035-1036.

The remedies to which the court refers are described at 11

U.S.C. § 9011. That section provides a remedy for frivolous bankruptcy petitions filed for an improper purpose "such as to harass or to cause unnecessary delay." 11 U.S.C. § 9011. See e.g. *In re Marsch*, 36 F.3d 825, 829-830 (9th Cir. 1994). By enacting Section 9011, Congress provided a penalty for frivolous filings and implicitly rejected state court remedies for bankruptcy filings.

The California appellate courts have adopted the reasoning and result of *Gonzales* to conclude that California courts possess no jurisdiction to impose penalties for the filing of a bankruptcy petition. See, e.g., *Idell v. Goodman*, 224 Cal.App.3d 262, 269 (1990); *Gene R. Smith Corp v. Terry's Tractor, Inc*, 209 Cal.App.3d 951, 953 (1989). Even so, the Fourth District Court of Appeals and the California Supreme Court failed to heed these cases, and improperly assumed jurisdiction where none existed.

Idell v. Goodman, supra, involved an attempt to bring a malicious prosecution in State court based on the filing of an adversary action in a bankruptcy proceeding. The court held that the penalties provided by the bankruptcy code for the filing of frivolous and malicious bankruptcy pleadings constituted an implicit rejection of state

court remedies, and that therefore federal law preempted the plaintiff's lawsuit. "[I]t is for Congress and the federal courts, not state courts, to decide what incentives and penalties shall be utilized in the bankruptcy process." 224 Cal.App.3d at 271.

Similarly, in *Gene R. Smith Corp v. Terry's Tractor, Inc.*, 209 Cal.App.3d at 954-955, a malicious prosecution case based on the wrongful initiation of bankruptcy proceedings, the Court held that the remedies for bad faith filings provided by federal law preempted state remedies for bad faith or frivolous filings. On that basis the Court affirmed the trial court's determination that plaintiff's claims were preempted by federal law, thus the Court concluded that it possessed no subject matter jurisdiction over plaintiff's action.

The trial court's imposition of penalties in the case at bar for the filing of a bankruptcy petition interfered with Congress' exclusive jurisdiction over bankruptcy matters, and this Court should grant this Petition in order to finally resolve this critical issue.

II. TO THE EXTENT SECTION 391 PERMITS THE IMPOSITION OF A PENALTY FOR THE FILING OF A BANKRUPTCY PETITION, IT VIOLATES THE

SUPREMACY CLAUSE

OF THE UNITED STATES CONSTITUTION

The California courts' interpretation of California *Code of Civil Procedure* § 391(a) and (b)(3) to permit the imposition of penalties for the filing of bankruptcy proceedings interferes with the laws of Congress. Accordingly, the trial court's interpretation of Section 391, which the Court of Appeal affirmed in its opinion, causes the statute to violate the Supremacy Clause of the United States Constitution. Petitioner respectfully requests that this Court grant his petition for the purpose of determining the constitutionality of Section 391 as interpreted by the California courts.

Specifically, the appellate court put forth the following analysis:

> Analyzing subdivision (b)(3) requires a translation of the word "litigation." Section 391 uses the word as a term of art. "Litigation" is defined in subdivision (a) of section 391 as "any civil action or proceeding, commenced, maintained or pending in any state or federal court of record." There is no doubt that, as defined, a bankruptcy filing fits the definition: it is a "proceeding" in a federal court of record. Section 391,

> subdivision (b)(3) therefore reads, when translated with an eye to the context of the case, and without extraneous language: "'Vexatious litigant' means a person who does any of the following:... In any [federal proceeding], while acting in propria persona, repeatedly ... engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

Appellate Opinion, (App. 8a).

This interpretation of subdivision (b)(3) as including bankruptcy proceedings creates an irreconcilable conflict with federal law. "[T]he States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." *Kalb*, 308 U.S. at 437, 60 S.Ct. at 346.

Where federal law conflicts with state law, the Constitution mandates that federal law prevail. See U.S. Const., Art. VI, Cl. 2. In determining whether federal law preempts state law, the controlling principle is whether the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971).

As interpreted by the trial court, California Code of Civil

Procedure § 391 et seq. imposes substantial penalties in addition to those already provided by Congress on individual litigants, who file frivolous bankruptcy petitions or institute bankruptcy proceedings solely intended to cause unnecessary delay. Congress and the federal courts have implicitly rejected[6] such an imposition of additional penalties, and the California courts' interpretation of section 391 constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

To allow the California interpretation of Section 391 et seq. to stand would "threaten the uniformity of federal bankruptcy law, a uniformity required by the Constitution." *Gonzales*, 830 F.2d at 1035.

For these reasons, if the term "Litigation" in Section 391 encompasses bankruptcy proceedings, Section 391 violates the Supremacy Clause of the United States Constitution and is invalid. The Supreme Court should hear this case to bring the interpretation of California *Code of Civil Procedure* § 391 into compliance with the United States Constitution.

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[6] *See Gonzales v. Parks*, 830 F.2d at 1036.

CONCLUSION

The California courts' interpretation of *Code of Civil Procedure* § 391 is contrary to the clear language of the statute and renders the statute unconstitutional. Moreover, no California court possesses jurisdiction to impose a penalty on Petitioner for the filing of a bankruptcy petition. Congress' provision of a remedy for frivolous bankruptcy filings preempts any imposition of state penalties for the same conduct. Accordingly, an interpretation of Section 391 which imposes a penalty for filing a bankruptcy petition causes the statute to violate the Supremacy Clause of the United States Constitution.

For these reasons, Certiorari should be granted.

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APPENDIX

Court of Appeal-4th Dist. Div.3
Filed December 16, 1994

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOWARD O. KIEFFER, Plaintiff and Appellant, and BANK OF AMERICA, et al., Defendants and Respondent.	Case No. G015656 (Super. Ct. No. 567341) OPINION

Appeal from a judgment of the Superior Court of Orange County, Richard O. Frazee, Judge. Affirmed.

Howard O. Kieffer, in pro. per., for Plaintiff and Appellant.

Michael J. Halloran, John C. Faurvre, Ullar Vitsut and James N. Roethe for Defendants and Respondents.

* * *

I.

In April 1984, Howard Kieffer bought a house using stolen funds for the down payment. Bank of America still has a loan on the property, and the loan soon went into default. Kieffer filed chapter 13 bankruptcy in November 1984; the proceeding was dismissed in June 1986 for failure to make payments under the chapter 13 plan. Bank of America filed a notice of default in December 1987, but Kieffer filed another chapter 13 bankruptcy in April 1988. This second bankruptcy was dismissed on May 9, less than a month later, again for failure to file a chapter 13 plan.

Kieffer's third bankruptcy came less than two weeks later, on May 19, and was dismissed on June 6. A fourth bankruptcy came within two weeks, on June 22.

Enough was enough. Each of Kieffer's four bankruptcies had been filed just before a scheduled foreclosure sale, so it was obvious he had no interest in reorganizing his debts: Kieffer was using the automatic stay provisions of the bankruptcy laws (see 11 U.S.C. § 362(d)) to live rent free. In August 1988, Bank of American obtained an order from the bankruptcy court declaring the he was acting in bad faith and ordering him to refrain from further bankruptcy filings or taking any action which would interfere or obstruct Bank of American's foreclosure.

Undaunted, Kieffer filed the instant state court action against Bank

of America and others on September 7, 1988, about a month after the bankruptcy court's order. His theory is that a Bank of America representative told him the bank would agree to accept payment and stop the foreclosure. The case lay dormant between October 1989 and December 1992 while Kieffer did a stint in federal prison for filing fraudulent tax returns.

In March 1993 the bank brought, among other legal attacks, a motion for an order to declare Kieffer a vexatious litigant. The court granted the motion in May and ordered a $45,000 bond posted by July 15. Kieffer posted no bond. On August 2, the court ordered the case dismissed as to the bank and related defendants, a determination which was reflected in an unsigned minute order of that date. Two days afterwards, on August 4, the bank served a document entitled "notice of entry of judgment dismissing complaint for failure to post a bond as a vexatious litigant." A formal judgment of dismissal was not filed until December 3, notice of entry of which was served on December 16, 1995.

II.

We must deal with two preliminary matters. First, is the appeal timely? The notice of appeal in the record was filed February 15, 1994, which is one day *after* the expiration of 60 days from the date of the notice of entry of the judgment on December 16.

According to the declaration of S. Leanne Dedrick, appended to

Kieffer's reply brief, Dedrick took Kieffer's notice of appeal and check for $250 (the filing fee) to the Orange County Superior Court at 3:30 p.m. on February 19, 1994. The clerk at the window refused to accept the document because there was not a $100 deposit to cover the clerk's expenses in preparing the record. (Dedrick's declaration is corroborated by a proof of service showing that a copy of the document was mailed on February 9.)

The next day was Lincoln's birthday. Kieffer tells us in his reply brief that he personally appeared with the notice and checks for $250 and $100 at the filing counter on February 14, and the clerk did accept the filing, but on February 22 the clerk "canceled the filing" of the appeal because there was no "pre-file order from the Court of Appeal" necessitated by the vexatious litigant order. (A copy of a February 22, 1984 letter to that effect from the clerk to Kieffer is appended to Kieffer's reply brief.) Kieffer further tells us that 10 days after certain conversations with clerks from the superior court and this court he was instructed to return the notice of appeal and the checks whereupon his notice of appeal would be filed. The filing date ended up being February 15.

Dedrick's declaration is credible in light of the February 9 service date. It is also true that in February of this year the clerk's office of the superior court was rejecting notices of appeal if they were unaccompanied by a $100 deposit to cover clerk's expenses in preparing the record, a practice

discontinued with *Rapp v. Golden Eagle Ins. Co.* (1994) 24 Cal.App.4th 1167 [clerk had duty to file notice of appeal even if tendered without $100 deposit to cover clerk's expenses]. We therefore find that the notice of appeal was presented to the clerk on February 10 and again on February 14, which was within the 60 days. (Code Civ. Proc., § 909 [reviewing court may make factual determinations].) That was enough to make it timely. (*Rapp, supra,* 24 Cal.App.4th at p. 1172 ["The act of delivering the document to the deputy clerk at the court during office hours constituted the act of filing."]; *Pacific Southwest Airlines v. Dowty-Rotol, Ltd.* (1983) 144 Cal.App.3d 491, 493 [notice of appeal received on February 26 but not stamped as filed until March 31 held to be filed February 26 because that was when the clerk's office received it].)

Moreover, the absence of a pre-file order could not affect the duty of the clerk to file the notice of appeal. A notice of appeal *challenging* a dismissal based on a vexatious litigant finding obviously cannot be held up by the clerk for the lack of a pre-file order which itself is based on the same vexatious litigant finding!

As to the dismissal order of August 2, it did not constitute an appealable judgment of dismissal because it was not signed by the court. (See Code Civ. Proc. § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court ..."]; see also *In re Marriage of*

MacFarane & Lang (1992) 8 Cal.App.4th 247, 253 [collecting authorities to the effect that an unsigned minute order is not an appealable judgment].)

The second preliminary matter is the effect of the dismissal with prejudice as to the buyers at the trustee's sale the Kieffer filed in January 1994 on his cause of action against Bank of America to set aside the trustee's sale. The bank argues the dismissal constitutes a "postjudgment retraxit" (renunciation) of his claims against it because his claims against the buyers involve identical issues to his claims against the bank. The idea, as put forward by the bank, is founded on the doctrine of collateral estoppel: The dismissal against the buyers constitutes a determination that the trustee's sale was not defective and therefore Kieffer is necessarily collaterally estopped to assert that the sale was defective in any further proceedings against the bank.

The argument fails because the doctrine of collateral estoppel requires two separate actions, as in the case relied on by the bank, *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813. If the doctrine applied to dismissals with prejudice filed against some, but not all, defendants in the same action, few cases involving multiple defendants could ever settle.

III.

We turn now to the merits. Kieffer presents four issues on appeal, but they are all simple variations on the claim that Kieffer does not come within the statutory definition of vexatious litigant.

The Code of Civil Procedure lists four categories of vexatious litigant, any one of which will do for purposes of requiring an order to furnish security. (Code Civ. Proc., §§391, subd.(b); 391.3.)[7] Two categories are clearly inapplicable (§ 391, subd. (b)(1) [losing five actions while in pro per in the preceding seven-year period]; subd. (b)(4) [previously being declared a vexatious litigant].) A third category (§391, subd. (b)(2) ["repeatedly" relitigating the validity of the determination against the same defendant or any of the issues in the case]) appears inapplicable on reflection: Whatever the merits of Kieffer's claims as to the validity of the trustee's sale, once Bank of America was able to extricate its foreclosure from successive automatic stays, that issue has never been litigated even once.

The crux of this appeal, then, is whether Kieffer fits within the final category, articulated in subdivision (b)(3) of section 391: "'Vexatious litigant' means a person who does any of the following: ... In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Analyzing subdivision (b)(3) requires a translation of the word "litigation." Section 391 uses the word as a term of art. "Litigation" is

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[7] All further statutory references are to the Code of Civil Procedure.

defined in subdivision (a) of section 391 as "any civil action or proceeding, commenced, maintained or pending in any state or federal court of record." There is no doubt that, as defined, a bankruptcy filing fits the definition: it is a "proceeding" in a federal court of record. Section 391, subdivision (b)(3) therefore reads, when translated with an eye to the context of this case, and without extraneous language: "'Vexatious litigant' means a person who does any of the following ... In any [federal proceeding], while acting in propria persona, repeatedly ... engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Kieffer presents no argument in his brief that his four bankruptcy filings were not in propria persona (and, an appellant, it is his burden to show error by pointing out that they were not, if he could do so). Nor does he contend that the filings were not a delaying tactic. Kieffer also does not present any challenge to the trial court's finding that there is "no reasonably probability" that he will prevail. (See § 391.3 [order requiring security must be based on determination that plaintiff is a vexatious litigant and that there is no reasonable probability he or she will prevail].)

Rather, Kieffer's basic argument is that "litigation," as used in section 391, subdivision (b)(3), is singular and therefore plainly limited to the instant case where it is, at best, dubious that he "repeatedly" has engaged in delaying tactics.

In light of the definition of "litigation" to include any federal proceeding, acceptance of Kieffer's argument necessarily requires us to hold that the small word "in" which begins subdivision (b)(3) ("In any litigation ...") is confined to delaying tactics *within* a single proceeding. Multiple bankruptcy proceedings (each successively dismissed) would not be covered under the statute.

Given the nature of bankruptcy proceedings, however, "in" as used in section 391, subdivision (b)(3) cannot be read so restrictively. *Repeated* bankruptcy petitions in *themselves* can constitute a delaying tactic.

Under federal bankruptcy laws, the mere filing of a bankruptcy petition automatically stays any foreclosure of the debtor's property. (11 U.S.C. § 362(d).) Coupled with the debtor's power to dismiss the bankruptcy proceeding, the stay can be used as an offensive weapon against lenders. By successive filings and dismissals -such as Kieffer perpetrated in 1988-a debtor could, in theory, postpone foreclosure indefinitely. Every time the lender complies with the state requirements for a valid foreclosure and is about to foreclose, the debtor pops up with a bankruptcy petition.

Just this year the Ninth Circuit noted the abusive nature of repeated bankruptcy filings in *In re Marsch* (9th Cir. 1994) 36 F.3d 825. Bankruptcy "mills" churn out large numbers of petitions-as many as 20,000 to 40,000 a year in the Central District alone-for the "sole purpose of delaying the debtor's

eviction." (Id. at p.830, fn.2.) In response, bankruptcy courts have fashioned the remedy of ordering debtors, such as Kieffer, not to file further bankruptcy proceedings when the debtors have shown, by their past action, that they are

THE ENCLOSED INFORMATION REGARDING CASE NUMBER G015656 HAS BEEN SENT TO THE FOLLOWING:

If applicable:

Orange County Superior Court, Appellate Division

Appellate Defender, Inc., San Diego

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and Continental Auxiliary Company

Filed June 1, 1993
Gary L. Granville, County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

HOWARD O. KIEFFER, Plaintiff, and BEN V. RODRIGUEZ, TERESA RODRIGUEZ, HUGH J. MCDONALD, MARY K. MCDONALD, PACIFIC PRUDENTIAL CORP., a California Corporation, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, BANK AMERICA PROPERTIES I, a California Corporation, CONTINENTAL AUXILIARY COMPANY, a California Corporation, and DOES 1-20, inclusive, Defendants.	Case No. 567341 ORDER DETERMINING PLAINTIFF HOWARD O. KIEFFER TO BE A VEXATIOUS LITIGATION AND TO POST SECURITY Date: May 11, 1993 Time: 1:30 p.m. Dept: 14 Trial Date: August 2, 1993
AND RELATED CROSS-ACTIONS.	Judge: Richard O. Frazee, Sr.

The Motion of defendant Bank of America N.T. & S.A., BA Properties I, Inc., and Continental Auxiliary Company for Order Determining Plaintiff Howard O. Kieffer To Be A Vexatious Litigant and To Post Security in the amount of $45,000 was regularly heard at the above date and time. Moving parties were represented by John C. Fauvre of the Office of General Counsel of Bank of America N.T. & S.A. Plaintiff Howard O. Kieffer appeared in propria persona.

After review of the moving papers, the evidence provided and referred to in the moving papers, including the Request for Judicial Notice and exhibits thereto, including, the prior pleadings in the Kieffer bankruptcy proceedings, Exhibits F, G, H, and I, the evidence of improper filings in this action, including Exhibit O, and evidence showing plaintiff does not have a reasonable probability of prevailing in this litigation against these defendants, including Exhibits P & Q, and the other documents referred to in the moving papers, the Court considered plaintiff's Objections to the Request for Judicial Notice in Support of Motion For Order Determining Plaintiff Howard O. Kieffer To Be A Vexatious Litigant, and overruled such objections, and the Court considered the Objections of the moving parities to the Declaration of Howard O. Kieffer Re Vexatious Litigant Motion, and sustained such objections, and upon consideration of the entire file in this action, the court finds that satisfactory proof having been made, and good cause appearing, IT

IS ORDERED:

1. Plaintiff Howard O. Kieffer is a vexatious litigant pursuant to Code of Civil Procedure Section 391 and there is no reasonable probability that he will prevail in the litigation against the moving defendants;

2. Plaintiff is required to furnish security for the benefit of the moving defendants in the amount of $45,000 within 45 days; and

3. If security is not furnished as ordered, the litigation shall be dismissed as to the moving parties, defendants Bank of America N.T. & S.A., BA Properties I, Inc., and Continental Auxiliary Company.

Dated: June 1, 1993

RICHARD O. FRAZEE, SR.
Judge Richard O. Frazee, Sr.
Superior Court

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Filed Dec. 3, 1993
Gary L. Granville, County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

HOWARD O. KIEFFER, Plaintiff, and BEN V. RODRIGUEZ, TERESA RODRIGUEZ, HUGH J. MCDONALD, MARY K. MCDONALD, PACIFIC PRUDENTIAL CORP., a California Corporation, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, BANK AMERICA PROPERTIES I, a California Corporation, CONTINENTAL AUXILIARY COMPANY, a California Corporation, and DOES 1-20, inclusive, Defendants.	Case No. 567341 JUDGMENT OF DISMISSAL AFTER FAILURE TO POST SECURITY AS A VEXATIOUS LITIGANT
AND RELATED CROSS-ACTIONS.	

Pursuant to this court's order filed June 1, 1993, Plaintiff Howard O. Kieffer was determined to be vexatious litigant and required to post security in the amount of $45,000.00 by July 15, 1993. Plaintiff Kieffer has failed to post security and, accordingly, on or about August 2, 1993, this court entered its order of dismissal. Accordingly, the court now enters this Judgment of Dismissal as to the claims of Howard O. Kieffer against defendants Bank of America N.T. & S.A., BA Properties I, Inc. and Continental Auxiliary Company.

Dated: Dec. 3, 1993

RICHARD O. FRAZEE, SR.
Judge Richard O. Frazee, Sr.
Superior Court

Court of Appeal-4th Dist. Div.3
Filed Jan 17, 1995

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIEFFER, HOWARD O.
V.
BANK OF AMERICA
GO15656
Orange County No. 56741

THE COURT:

The petition for rehearing is DENIED.

SILLS, P.J.
Presiding Justice

We Concur:

WALLIN, J.
Justice

CROSBY, J.
Justice

cc: Orange County Superior Court, Appellate Division
All Counsel

SUPREME COURT
FILED MAR. 2, 1995
Robert Wandruff, Clerk

Fourth Appellate District, Division Three, No. GO15656
SO44543

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

HOWARD O. KIEFFER, Appellant

v.

BANK OF AMERICA ET AL., Respondents

Appellant's petition for review DENIED.

Lucas, C.J., Mosk, J. Baxter, J. and George, J. did not participate.
Anderson (Carl West), Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Counsel, participated.

Arabian, J.
Acting Chief Justice

4th Civil No. GO15656

In The Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION THREE

HOWARD O. KIEFFER,

Plaintiff and Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,
a National Banking Association,
BA PROPERTIES I, Inc.,
a California Corporation, and
CONTINENTAL AUXILIARY COMPANY,
a California Corporation

Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RICHARD O. FRAZEE, SR., JUDGE

O.C.S.C. No. 56741

APPELLANT'S PETITION FOR REHEARING

HOWARD O. KIEFFER

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Appellant in Propria Persona

4th Civil No. G015656

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

HOWARD O. KIEFFER Plaintiff and Appellant, BANK OF AMERICA, et al Defendants and Respondents.	G015656 (Super. Ct. No. 567341)

Appeal from the Superior Court of California, County of Orange

Honorable Richard O. Frazee, Sr., Judge Presiding

PLAINTIFF/APPELLANT'S PETITION FOR REHEARING

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Plaintiff/Appellant in Propria Persona

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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

HOWARD O. KIEFFER Plaintiff and Appellant, BANK OF AMERICA, et al Defendants and Respondents.	G015656 (Super. Ct. No 567341)

Appeal from the Superior Court of California, County of Orange

Honorable Richard O. Frazee, Sr., Judge Presiding

PLAINTIFF/APPELLANT'S PETITION FOR REHEARING

To the Honorable David G. Sills, Presiding Justice, and the Associate Justices of the Court of Appeal for the State of California, Fourth Appellate district, Division Three:

Plaintiff and appellant Howard O. Kieffer as petitioner, hereby petitions the Court for a rehearing on the above-entitled matter of the points set forth below.

POINT 1: CALIFORNIA STATE COURTS POSSESS NO JURISDICTION TO IMPOSE PENALTIES FOR THE FILING OF BANKRUPTCY PETITIONS

The Court may grant rehearing on points newly urged in a petition for rehearing where good cause exists.[8] Good cause exists where the petitioning party raises jurisdictional issues or issues involving the validity of a state statute. *See e.g. Sime v. Malouf*, 95 Cal.App.2d 82, 116 (1949) (jurisdiction question raised); and *People v. Marine Products Co.*, 77 Cal.App.2d Supp. 929, 936 (1947) (validity of state statute involved). In this instance, petitioner questions both the jurisdiction of the trial court to make its determination and the constitutionality of California Code of Civil Procedure §391 as applied.

Both the Third and Fourth District Court's of Appeal have determined

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8 In this case, plaintiff appeared on his own behalf without aid of counsel, and was unaware of the jurisdictional and constitutional issues raised by the trial court's ruling.

the California courts possess no jurisdiction to impose penalties of the filing of a bankruptcy petition. The trial court's finding of vexatious litigant status based on prior bankruptcy petitions constitutes a penalty for these filings, which the court possessed no jurisdiction to impose.

In *Idell v. Goodman*, 224 Cal.App.3d 262, 269 (1990) and *Gene R. Smith Corp v. Terry's Tractor, Inc.*, 209 Cal.App.3d 951, 953 (1989), the courts adopted the opinion of *Gonzoles v. Parks*, 830 F.2d 1033 (9th Cir. 1987) which stated:

> Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating. . .
>
> That Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is

> supported by the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous. Debtors filing bankruptcy petitions are subject to a requirement of good faith, . . . and violations of that requirement can result in the imposition of sanctions . . . *Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions shall be read as an implicit rejection of other penalties,* . . .In any event, it is for congress and the federal courts, not the state court, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized.

Gonzales v. Parks, supra, 830 F.2d at 1035-1036. *(emphasis added.)*

Idell v. Goodman, supra, involved an attempt to bring a malicious prosection in State court based on the filing of an adversary action in a bankruptcy. The Court held that the penalties provided by the bankruptcy code for the filing of a frivolous and malicious bankruptcy pleadings constituted an implicit rejection of state court remedies, and that therefore federal law preempted the plaintiff's lawsuit:

> The existence of federal sanctions for filing of frivolous and malicious bankruptcy pleadings must be made as an implicit

> rejection of state court remedies. . . . *[I]t is for congress and the federal courts, not state courts, to decide what incentives and penalties shall be utilized in the bankruptcy process.*
>
> Because in our view plaintiff's lawsuit was preempted by federal law, the trial court properly sustained defendants' demurrer without leave to amend. *Idell v. Goodman, supra*, 224 Cal.App.3d at 271 (*emphasis added*).

Similarly, in *Gene R. Smith v. Terry's Tractor, Inc., supra*, 209 Cal.App.3d at 954-955, a malicious prosecution case based on the wrongful initiation of bankruptcy proceedings, the Court held that the remedies for bad faith filings provided by federal law preempted state remedies for bad faith or frivolous filings. On that basis the Court affirmed the trial court's determination that plaintiff's claims were preempted by federal law, thus the Court concluded that it possessed no subject matter jurisdiction over plaintiff's action.

Bankruptcy Code §9011, 11 U.S.C. §9011, provides a remedy for frivolous bankruptcy petitions and pleadings or petitions filed for an improper purpose "such as to harass or to cause unnecessary delay." *See e.g. In re Marsch*, 36 F.3d 825, 829-830 (9th Cir 1994). By enacting §9011, Congress provided a penalty for frivolous filings and *implicitly rejected state court remedies for bankruptcy filings.* Thus, federal law preempts California Code

of Civil Procedure §391(b)(3) to the extent that it permits the imposition of a penalty for the filing of a bankruptcy petition.

The trial court's imposition of penalties for the filing of a bankruptcy petition interfered with Congress' exclusive jurisdiction over bankruptcy matters. Additionally the trial court's ruling was directly contrary to the holdings in Idell and Gene R. Smith Corp. which clearly stated that congress and the federal courts, not the state courts, should determine the incentives and penalties for bad faith or frivolous bankruptcy proceedings.

Because the trial court possessed no jurisdiction to impose a penalty of Mr. Kieffer for the filing of his prior bankruptcy petitions, the trial court's determination that Mr. Kieffer is a vexations litigant must be reversed.

POINT 2: TO THE EXTENT §391 PERMITS THE IMPOSITION OF A PENALTY FOR THE FILING OF A BANKRUPTCY PETITION, IT VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

If the California courts interpret CCP §391(b)(3) to permit the imposition of penalties for the filing of bankruptcy proceedings, the statutes interferes with the laws of Congress. Accordingly, the trial court's interpretation of §391(a), which this Court affirmed in its Opinion, causes the statute to violate the Supremacy Clause of the United States Constitution.

Where federal law conflicts with state law, the Constitution mandates that federal law prevail. U.S. Const., Art. VI, CI, 2. In determining whether federal law preempts state law, the controlling principle is whether the state statute "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Grimes v. Hoschler*, 12 Cal.3d 305, 310 (1974) (quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971)).

The constitution requires uniformity of federal bankruptcy law. U.S. Const, Art I, Sec. 8 cl.4. Congress' authorization of certain sanctions for the filing of frivolous bankruptcy proceedings or bankruptcy proceedings or bankruptcy proceedings interposed to cause unnecessary delay *constitutes an implicit rejection of other penalties. Gonzalez v. Parks, supra.*, 830 F.3d at 1036; *Idell v. Goodman, supra.*, 224 Cal.App.3d at 271; *Gene R. Smith v. Terry's Tractor, Inc. supra.*, 209 Cal.App.3d at 954-955. (*emphasis added.*)

As interpreted by the trial court, California Code of Civil Procedure §391 et seq. imposes a substantial penalties *in addition to those already provided by Congress* on individual litigants, who file frivolous bankruptcy proceedings or bankruptcy proceedings solely intended to cause unnecessary delay. Congress and the federal courts have implicitly rejected such an imposition of additional penalties. Accordingly, the trial court's interpretation of §391 et seq. stands as an obstacle to the accomplishment and execution of the full proposes and objectives of Congress.

For these reasons, if the term "civil proceedings" in §391(a) encompasses bankruptcy proceedings, §391 violates the Supremacy Clause of the United States Constitution and is invalid. Therefore, the decision of the trial court should be reversed.

POINT 3: BANKRUPTCY FILINGS DO NOT CONSTITUTE "CIVIL ACTIONS OR PROCEEDINGS" UNDER CALIFORNIA CODE OF CIVIL PROCEDURES §391

The lower court concluded, and this Court agreed, that Mr. Kieffer's filing of previous petitions in bankruptcy satisfied the requirements of §391(b)(3), the vexatious litigant statutes. Because actions in bankruptcy do not fall within the §391 definition of "litigation," however, the lower court's conclusion is incorrect, and Mr. Kieffer cannot be characterized as a vexatious litigant.

Section 391(b)(3) states that a vexatious litigant is a person who "[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." The term "litigation" has been narrowly defined by the California Legislature as any *civil* action or proceeding, commenced, maintained or pending in any state or federal court of record." (*emphasis added.)*

The four bankruptcy actions filed by Mr. Kieffer are not "civil" in nature and, therefore, do not fall within §391 definition of "litigation". As a result, Mr. Kieffer has participated in no litigation, action or proceeding which would bring him within the purview of the vexatious litigant statute.

It is axiomatic that bankruptcy cases are unique from actions brought in state and federal courts. First, while state and federal courts are judicial creatures, bankruptcy courts are purely a product of the Congressional power vested by Article I, Section 8 of the United States Constitution. This distinction is more than merely esoteric. As the Ninth circuit recognized in *In re Marsch*, cited by this Court in the underlying opinion, "experience has shown that bankruptcy proceedings are subject to a degree of manipulation and abuse not typical of *civil litigation*." *In re Marsch*, 36 F.3d 825, 830 (9th Cir. 1994) (*emphasis added.*)

Historically, civil actions have been limited to those which imply both adverse parties and an issue, and are designed for the recovery or vindication of a civil right or the redress of some civil wrong. *Bobst v. Williams*, 287 Mo. 317, 229 S.W. 796, 798. The bankruptcy courts, however, which neither vindicates rights nor redress civil wrongs, serve no such purpose.

The California courts concur in the distinction between civil actions/proceedings and bankruptcy actions. In *Rosenthal v. State Bar of California*, 43 Cal.3d 612, 617 (1987)j, the court, in dicta, recognized a

distinction between civil, probate, bankruptcy and tax proceedings." The distinction between "civil actions and bankruptcy actions was also acknowledged in *Idell v. Goodman, supra.* In that cause, the court recognized the "substantial differences between a civil plaintiff and a party opposing a discharge of debts in bankruptcy. As we have repeatedly noted, a civil plaintiff seeks affirmative relief in an action capable of a separate existence, while an opponent of a bankruptcy discharge does not." Idell at 277. Such a distinction indisputably places bankruptcy on the non-civil side of the demarcation established in Bobst and similar historical cases.

In sum, §391 applies only to litigation of a civil nature. The four bankruptcies which form the basis of the trial court's conclusion that Mr. Kieffer is a vexatious litigant, however, are not "civil" actions. Therefore, those bankruptcy filings cannot be used as the basis for a §391 ruling. Mr. Kieffer cannot be considered a vexatious litigant under California law, and the trial court's decision should be reversed.

POINT 4: **THIS COURT ERRED IN INTERPRETING CALIFORNIA CODE OF CIVIL PROCEDURE §391(B)(3)**

In drafting §391(b)(3) of the California Code of Civil Procedure, the legislature made clear that a "vexatious litigant" is one who, *in the same action or proceeding*, repeatedly files "unmeritorious motions, pleadings, or

other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." Kieffer, who has merely file four *separate* bankruptcy actions, does not come close to satisfying this definition. The finding that Mr. Kieffer is a "vexatious litigant," therefore, is erroneous and this Petition for Rehearing should be granted.

There is no dispute that Kieffer filed four bankruptcy actions. Those filings alone, however, are insufficient to bring Kieffer within the realm of §391(b)(3). As this Court recognized in its Opinion filed December 16, 1994, the legislature intended the term "litigation" to be a term of art. Opinion at 6.

A review of §391 reveals that, as a term of art, the word "litigation" is singular, whereas the word "litigations" is plural. Section 391(a) defines the term "litigation" as any action or proceedings. The words "action" and "proceeding" are not plural. Accordingly, by statutory definition, the term litigation must be singular. This conclusion is inescapable in light of the Legislature's use, in §391(b)(1), of the plural phrase "at lease five *litigations.*" Because the Legislature failed to use the plural word "litigations" anywhere else in the statute, it can be presumed that the remaining references to "litigation" are intended to be singular. This interpretation is bolstered by the fact that §391(b)(3) uses the phrase "any action or proceeding." In that phrase, the word "any" clearly refers to the singular words "action" or

"proceeding"

Moreover, the entire statutory scheme of §391 makes no sense unless "litigations" implies more than one lawsuit, while "litigation" encompasses only one lawsuit. If §391(b)(3) applies to litigants who file more than one frivolous lawsuit, §391(b)(1) becomes virtually meaningless. §391(b)(1) requires "at least five litigations" for a determination of vexatious litigant status. NO purpose of the five litigations requirement of (b)(1) exists, where a different section of the same statute requires less than five prior litigations for vexatious litigant status. Clearly, (b)(1) applies to the filing of separate meritless lawsuits, while (b)(3) applies to motions and other conduct occurring within the same lawsuit. Only this interpretation of §391 gives full meaning and effect to each of the provisions of §391.

Despite this clear meaning of this section's language and unambiguous legislative intent, this Court applied §391(b)(3) to Mr. Kieffer's filing of four separate *litigations*. This holding was clearly contrary to the language and intent of the statute. The mere filing of four bankruptcy petitions cannot subject Mr. Kieffer to §391(b)(3).

At no time has their ever been any suggestion that Mr. Kieffer filed unmeritorious or frivolous motions in the context of any of the four separate bankruptcy proceedings or the State Court action, nor is there any indication that he conducted unnecessary discovery or that, in the context of any of those

proceedings, he engaged in delaying tactics. In other words, there is no statutory basis for a finding that Mr. Kieffer is a "vexatious litigant." Quite simply, the Court's initial ruling was erroneous and this Motion for Rehearing should be granted.

POINT 5: THIS COURT'S OPINION CONTAINS SEVERAL MATERIAL FACTUAL ERRORS

As this Court acknowledged in its Opinion, the merits of Mr. Kieffer's claims against Bank of America have never been litigated. Opinion at page 6. It appears, however, that this Court adopted *allegations* made by respondents in pleadings, of which the trial court took judicial notice, as established facts.

While a court may take judicial notice of documents filed with federal or state courts, it may not take judicial notice of the truth of the allegations contained in those documents. *Sosinsky v. Grant*, 6 Cal.App.4th 1548, 1565-1570 (1992). Appellant respectfully submits that because no court has ever has ever made a determination concerning the factual allegations made by either Mr. Kieffer of Bank of America, the inclusion of such allegations as established facts in this Court's Opinion was erroneous.

Appellant did not purchase his home using stolen funds and no court has ever made such a determination, yet this Court included such a prejudicial statement in the first line of its Opinion. Appellant purchased his home

subject to a first deed of trust and the Bank of America loan (secured by a second deed of trust) in 1984 and never defaulted on the obligations. Rather in 1987, Bank of America sought to enforce the "due on sale" clause in its note to the home's former owner and filed a notice of default. Indeed, even this Court's opinion states that although appellant purchased his home in 1984, respondent did not file a notice of default until December, 1987. Thus, this Court's statement that Kieffer "soon went into default" after purchasing the home is without any factual basis.

On page 7 of its Opinion, this Court emphasized that a debtor can abuse the bankruptcy statutes within his power to dismiss a bankruptcy proceedings. The Court fails to note, however, that Mr. Kieffer *never voluntarily dismissed* his bankruptcy proceedings. While appellant did file a bankruptcy in 1984, that bankruptcy had not relation to the Bank of America loan, as evidenced by the fact that appellant had not defaulted on the Bank of America Loan at the time the bankruptcy was filed. Appellant filed his second bankruptcy in April, 1988, while acting in propria persona. The bankruptcy court dismissed the bankruptcy proceeding for procedural errors made by the appellant. Similarly, the court dismissed appellant's May 9, 1988, filing because of *procedural errors*. When appellant corrected the procedural errors and filed his third bankruptcy in June, 1988, the court made the bad faith determination. Appellant did not make the successive filings to

delay processing of his bankruptcy, but rather to correct the procedural errors for which the *court* dismissed his prior bankruptcies.

Moreover, during the entire pendency of the bankruptcies and the state court action, Mr. Kieffer made payments first to Bank of America then to the purchaser at the trustee sale. Thus, this courts assertion that "Kieffer was using the automatic stay provisions of the bankruptcy laws to live rent free" is simply untrue.

Additionally, the trustee sale took place before Mr. Kieffer filed his action in state court, thus the state court filing could not possibly have been an attempt to delay the foreclosure sale.

Finally, appellant's case against respondent did not lay dormant between October 1989 and December 1992, but rather was actively litigated by appellant's attorneys who filed and pursued the action prior to withdrawing as counsel in December of 1993.

The facts stated in this Court's Opinion have never been adjudicated by any trier of fact. Appellant respectfully submits that this Court should grant appellant's petition for rehearing to correct the extensive number of factual errors in the Court's Opinion.

CONCLUSION

The interpretation given to California Code of Civil Procedure §391 is contrary to the clear language of the statute and renders the statute

unconstitutional. Moreover, neither the trial court nor this Court possess jurisdiction to impose a penalty on the appellant for the filing of a bankruptcy petition. Congress' provision of a remedy of frivolous bankruptcy petitions or bankruptcy proceedings initiated solely for the purposes of delay preempts any imposition of state penalties for the same conduct. Accordingly, an interpretation of §391 which imposes a penalty for filing a bankruptcy petition causes the statute to violate the Supremacy Clause of the United States Constitution.

For these reasons, the appellant respectfully requests that this Court grant his petition for rehearing and further requests that this Court reverse the trial court's determination that appellant is a vexatious litigant.

Dated: May 23, 1995

Respectfully submitted,

HOWARD O. KIEFFER
Howard O. Kieffer
Plaintiff/Appellant *in propria persona*

California *Code of Civil Procedures §391*

As used in this title, the following terms have the following meanings:

(a) "litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court of record.

(b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted or maintained in propria persona at lease five litigations other than in a small claims court that have been (I) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (I) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation, while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary

discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

© "Security" means an undertaking to assure payment to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation, or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

11 U.S.C. § 9011

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the

filing of the document, including a reasonable attorney's fees.

(b) Verification. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, and unsworn declaration as provided in 28 U.S.C. §1745 satisfies the requirement of a verification.

(c) Copies of Signed or Verified Papers. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

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